

**Amendment and Response**

Applicant: John P. Rebhorn et al.

Serial No.: 09/781,581

Filed: February 12, 2001

Docket No.: 5487USA

Title: PORTABLE, STACKED CONTAINER AND METHOD FOR SEPARATELY STORING AND DISPENSING TWO CONSUMABLE PRODUCTS, ESPECIALLY CEREAL AND MILK

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**REMARKS**

This Amendment is responsive to the Office Action mailed April 10, 2003. In that Office Action, the Examiner rejected claims 20 and 39 under 35 U.S.C. §112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. Claims 1, 4-7, 11, 20, 22-24, and 39-43 were rejected under 35 U.S.C. §102(b) as being anticipated by Bishop, U.S. Patent No. 3,069,043 ("Bishop"). Claims 20 and 22 were rejected under 35 U.S.C. §102(b) as being anticipated by Silver, U.S. Patent No. 4,159,066 ("Silver"). Claims 1-7, 11, 15-20, 22, 23, 25, 28, 29, 31, 33, 39-41, and 43 were rejected under 35 U.S.C. §102(e) as being anticipated by Gerhart et al., U.S. Patent No. 6,528,105 ("Gerhart"). Claim 21 was rejected under 35 U.S.C. §103(a) as being unpatentable over Bishop in view of Siegel et al., U.S. Patent No. 5,209,909 ("Siegel"). Claim 8 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Ness, U.S. Patent No. 5,753,289 ("Ness"). Claims 9 and 10 were rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Dickerson, U.S. Patent No. 5,706,980 ("Dickerson"). Claims 21, 24, and 32 were rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Siegel. Claim 26 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Newarski, U.S. Patent No. 5,496,575 ("Newarski"). Claim 27 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Newarski and Siegel. Claims 1-7, 9, 10, 12-19, 22-25, and 28-33 were rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Siegel and Gerhart. Claim 8 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Siegel and Gerhart, and further in view of Ness. Claim 11 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Siegel and Gerhart, and further in view of Ours et al., U.S. Patent No. 6,264,068 ("Ours"). Claims 26 and 27 were rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Gerhart and Siegel, and further in view of Newarski.

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With this Response, claims 20 and 22 have been amended. It is believed that all claims are now in a condition for allowance. Notice to that effect is respectfully requested.

**Claim Rejections under 35 U.S.C. § 112**

Claims 20 and 39 were rejected under 35 U.S.C. §112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. In particular, claims 20 and 39 were rejected for reciting "a base defining a non-circular perimeter." Applicant respectfully submits that such a limitation is fully supported by the specification. As cited by the Examiner, the specification states "[i]n one preferred embodiment, and as shown in FIG. 3A, a recessed 74 is formed at a lower portion of the side wall 62" (Page 13, lines 3-4). Although the specification does not expressly mention the recess is may also be formed in the bottom, reference to FIGS. 3A, 3B, and 4 illustrate just such an embodiment. Notably, as described in the "Brief Description of the Drawings" section of the specification, each of FIGS. 3A, 3B, and 4 present a different view or portion of the embodiment illustrated in FIG. 1. As such, each of FIGS. 3A, 3B, and 4 relate to the same embodiment of the invention.

Turning first to FIG. 3A, the mere fact that the line representing bottom 60 is continuous does not suggest that the otherwise circular bottom 60 is not disrupted by recess 74. Rather, the continuous line represents the continuation of the bottom 60 around the recess 74, or with respect to the side view of FIG. 3A behind the recess 74. This is further evident by looking to FIG. 3B. FIG.3B illustrates a top view of the inner compartment. As noted by the Examiner, there is a solid line through recess 74. However, the solid line that runs through recess 74 is offset from the solid circular line representing the perimeter of the bottom 60. This offset is due to the fact that the solid line within recess 74 does not represent a portion of the perimeter of the bottom 60. Rather, the solid line within recess 74 represents a bend in the recess 74 itself. This bend is better illustrated in FIG. 4 near the lead line to the reference numeral "74." FIG. 4 further emphasizes the fact that in the illustrated embodiment, the bottom 60 does not continue through

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the recess 74. Conversely, the recess 74 not only is formed through the lower portion of the side wall 62, but the recess 74 continues through the bottom 60, thereby, rendering the perimeter of the bottom 60 non-circular.

As such, the specification in light of the drawings as filed, fully support a claim including the limitation of a second, inner compartment base defining a non-circular perimeter. Accordingly, it is respectfully requested that the rejection to claims 20 and 39 under 35 U.S.C. §112, first paragraph, be withdrawn.

**Claim Rejections under 35 U.S.C. § 102**

Claims 1, 4-7, 11, 20, 22-24, and 39-43 were rejected under 35 U.S.C. §102(b) as being anticipated by Bishop, U.S. Patent No. 3,069,043 ("Bishop"). Independent claims 1, 20, 22, and 24 each recite a second, inner compartment including an annular lip and a pour opening formed through the lip. A cover is secured to the lip and seals the pour opening. Bishop fails to teach or otherwise suggest at least these limitations.

Bishop relates to a food package for holding food which may be heated in preparation for serving and served from the package (Abstract). The food package of Bishop is similar to a double boiler. As such, the package of Bishop includes an outer container 4 and a food container 5 mounted within the outer container 4 (Column 1, lines 33-56). A cover or closure 20 protects the food in container 5. As illustrated in FIG. 4, the only figure including some of the other limitations of the independent claims and the only figure cited by the Examiner, cover 20 extends across the entire perimeter of the food container 5. It is not clear whether the cover 20 of FIG. 4 is secured to the flange 30 or to the outer container 4. Argumentatively assuming the cover 20 is secured to the flange 30, the cover 20 fails to seal the hole 24 that is formed through the flange 30. Notably, to seal the hole, the cover must "close or make secure against access, leakage, or passage" (Merriam-Webster's Collegiate Dictionary 10<sup>th</sup> Ed., p. 1049, column 2 (2001)). The hole 24 is not secured against access, leakage, or passage as the hole 24 is open to inner compartment of food container 5 as illustrated in FIG. 4.

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Consequently, for at least the above described reasons, Bishop fails to teach or otherwise suggest “a cover secured to the lip and sealing the pour opening” as recited in independent claims 1, 20, 22 (as now amended), and 24. Therefore, claim 1, 20, 22, and 24 are believed to be allowable over Bishop. Similarly, claims 4-7, 11, 23, and 39-43, which depend from independent claims 1, 20, and 22, are also believed to be allowable over Bishop.

Claims 1-7, 11, 15-19, 22, 23, 39-41, and 43 were rejected under 35 U.S.C. §102(e) as being anticipated by Gerhart. Independent claims 1, 15, and 22 relate to a container including a first, outer compartment and a second, inner compartment. The first, outer compartment includes a bottom, a first compartment side wall, and an annular rim extending from or formed at a top of the first compartment side wall. The second, inner compartment includes a base, a second compartment side wall, an annular lip extending from or formed at a top of the second compartment side wall, and a pour opening formed through the lip. Upon final assembly, the second compartment nests within the first compartment such that the lip abuts the rim. Gerhart fails to teach or otherwise suggest at least these limitations.

Gerhart relates to a single handed container for mixing foods (Abstract). The container of Gerhart includes an outer container 100 and an inner container 200 that fits inside the outer container 100 (Column 3, lines 26-56). Outer cup 100 includes an upper lip 105. Inner cup 200 includes an eating surface 225 and an attaching lip 215. Eating surface 225 forms a vent or vents 230 to allow the liquid contained within the outer cup 100 to pass to a consumer's mouth (Column 3, lines 49-52). Upon assembly, the attaching lip 215 of the inner cup 200 fits securely over the lip 105 of the outer cup 100 (Column 3, lines 56-58; FIG. 3). As such, the attaching lip 215 abuts the lip 105 of the outer cup 100 but does not form a vent or opening. In the Gerhart container, the vent or opening 230 is formed in the eating surface 225, which is spaced from the attaching lip 215. Therefore, Gerhart fails to teach or suggest an annular lip of the second, inner compartment in which the pour opening is formed through and to which the rim of the first, outer compartment abuts upon final assembly as required by the limitations of claims 1, 15, and 22.

For at least the reasons described above, independent claims 1, 15, and 22 are not taught or otherwise suggested by Gerhart and, consequently, are believed to be allowable over Gerhart.

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Dependent claims 2-7, 11, 16-19, 23, 39-41, and 43 each depend from either claim 1, claim 15, or claim 22. Accordingly, dependent claims 2-7, 11, 16-19, 23, 39-41, and 43 are also believed to be allowable over Gerhart.

Claim 20 was rejected under 35 U.S.C. §102(e) as being anticipated by Gerhart. Claim 20 relates to a portable, single use container including a first, outer compartment and a second, inner compartment. Second, inner compartment includes a base defining a non-circle perimeter. Gerhart fails to teach or otherwise suggest such a limitation. In particular, the bottom 210 of the inner container 200 of Gerhart is only disclosed as having a circular perimeter as evident by the figures as well as specification passages referring the diameter of the inner and outer containers 100 and 200 (e.g. Column 3, lines 60-67). As such, Gerhart fails to teach or otherwise suggest a inner compartment base with a non-circular perimeter as required by claim 20. For at least this reason, claim 20 is believed to be allowable over Gerhart.

Claims 20 and 22 were rejected under 35 U.S.C. §102(b) as being anticipated by Silver. Claims 20 and 22 both relate to a portable, single-use container including a first, outer compartment and a second, inner compartment. With this Response, claims 20 and 22 have been amended and now recite a fluid passageway defined by an interior surface of the first compartment side wall and an exterior surface of the second compartment side wall, the fluid passageway fluidly connecting the first compartment internal storage region and the pour opening. Silver fails to teach or otherwise suggest at least these limitations.

In particular, Silver relates to a package for dispensing a plurality of flowable materials (Abstract). The package of Silver includes an outer container 1 and an inner container 11 disposed within the outer container 1. A fluid passage is formed between apertures 18 and 20 and is fully formed and contained by the inner container 11 (FIGS. 1 and 2; column 3, line 55-column 4, line 3). Since the fluid passage connecting the compartment formed by the outer container 1 to the dispensing orifice 20 is fully formed by the inner container 11, Silver does not disclose a fluid passageway defined by an interior surface of the first compartment side wall and an exterior surface of the second compartment side wall as required by the limitations of amended claims 20 and 22.

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Further, Silver teaches away from such a modifications as Silver functions as a piston, and as such, includes sealing rings 17 around the outside surface 16 of the inner container 11 "to effect a better seal between outside surface 16 and inside surface 6" (Column 3, lines 30-46). Therefore, forming a passage between the two containers 1 and 11 would frustrate the seal between the outside surface 16 and inside surface 6 and, consequently, frustrate the basic workings of the Silver container as a piston.

For at least the above described reasons, amended claims 20 and 22 are not taught or otherwise suggested by Silver and, accordingly, are believed to be allowable over the Silver reference.

Claims 25, 28, 29, 31, and 33 were also rejected under 35 U.S.C. §102(e) as being anticipated by Gerhart. Independent claim 25 relates to a method of manufacturing a container which includes providing a second, inner container including an annular lip, which forms a pour opening, and placing the second compartment into a first compartment such that the lip rests on a rim of the first compartment. Notably, similar to the limitations of independent claims 1 and 15 the method requires providing and positioning two compartments including a lip that forms a pour opening and rests on the rim. As described above with respect to claims 1 and 15, the container of Gerhart fails to teach or otherwise suggest such limitations. Therefore, independent claim 25 is believed to be allowable over Gerhart. Accordingly, claims 28, 29, 31, and 33, which depend from independent claim 25 are also believed to be allowable over Gerhart.

**Claim Rejections under 35 U.S.C. § 103**

Independent claims 1, 15, 22, and 24 were rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Siegel and Gerhart. As stated above each of claims 1, 15, 22, and 24 include an inner and an outer container, the outer container including an annular rim, and the inner container includes an annular lip, through which a pour opening is formed. Upon final assembly the lip abuts and/or is permanently affixed to the rim. None of the cited references teach or otherwise suggest such a limitation. As cited by the Examiner, Dickerson fails to teach or otherwise suggest that the lip abuts the rim or that the lip is permanently affixed

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to the rim (Paper no. 13, ¶42). Gerhart fails to alter this analysis. As described above, Gerhart fails to teach a lip, through which the pour opening is formed, that abuts the rim or, consequently, that is permanently fixed to the rim.

In addition, Siegel cannot be viewed as rendering claims 1, 15, 22, or 24 obvious by itself or in conjunction with other references as it fails to qualify as analogous art. To rely on a reference as a basis for an obviousness rejection of a claimed invention, "the reference must either (1) be in the field of applicant's endeavor or, if not, then (2) be reasonably pertinent to the particular problem with which the inventor was concerned." *In re Oetiker* 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). Siegel relates to the decontamination art and, the field of packaging powdered sterilant reagents for use in disinfecting medical instruments (Column 1, Lines 25-29). This is entirely unrelated to the field of the pending application's containers. Stated otherwise, an inventor devising a new consumable product container would not logically have considered a medical instrument sterilizing package. Clearly, the powdered reagents of the Siegel package are not consumable. Further, the disinfectant packaging of Siegel is not reasonably pertinent to the particular problem associated with the present invention. In particular, the present invention not only addresses the problem of separately containing consumable products, but also facilitating optimal consumption thereof by a consumer through pre-defining pour openings and a fluid passageway. The Siegel packaging does not dispense the sterilant reagent through an upper aperture 84; instead, the aperture 84 is only provided for filling purposes. The sterilant reagents are released from the Siegel package via knives 14 that pierce the package's bottom (best shown in Figure 4 of Siegel). Thus, not only does Siegel represent an entirely different field of endeavor, but is in no way pertinent to the problem addressed by the present invention. These facts are highly similar to those presented in *In re Oetiker*, where court held that a reference relating to fasteners for garments was not analogous to the hose clamp invention. Similar, with respect to the present invention, not all packaging or containment problems are analogous. In summary, packaging a sterilant powdered reagent is not analogous to separately containing, and facilitating dispensement thereof, two consumable products. As such, Siegel cannot be used as part of an obviousness rejection for any of the pending claims as it is not analogous prior art. It

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is respectfully requested that the Examiner specifically address the contention, and related reasoning, that Siegel is non-analogous.

In light of the above, it is respectfully submitted that independent claims 1, 15, 22, and 24 are not taught or otherwise suggested by the cited references and, consequently, are believed to be allowable over Dickerson, Siegel, and Gerhart.

Claims 2-7, 9, 10, 12-14, 16-19, and 23 were also rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Siegel and Gerhart. Each of dependent claims 2-7, 9, 10, 12-14, 16-19, and 23 further defines either independent claim 1, 15, or 22. As described above, claims 1, 15, and 22 are believed to be allowable over the cited references. Therefore, dependent claims 2-7, 9, 10, 12-14, 16-19, and 23 are also believed to be allowable over the cited references.

Claim 8 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Ness and over Dickerson in view of Siegel, Gerhart, and Ness. Claim 8 depends from independent claim 1, which as described above was not taught or otherwise suggested by Dickerson, Siegel, and Gerhart. In particular, Dickerson and Gerhart fail to teach a lip through which the pour opening is formed that abuts the rim upon final assembly, and Siegel is non-analogous art. Ness fails to alter the analysis. Ness relates to a portable food container for storing dry and liquid foods for consumption (Abstract). The container 10 of Ness incorporates side-by-side container, and therefore, fails to teach or otherwise suggest a container wherein upon final assembly, the second compartment nests within the first compartment such that the lip of the second compartment abuts the rim of the first compartment as required by the limitations of independent claim 1. Therefore, dependent claim 8 is also believed to be allowable over the cited references.

Claims 9 and 10 were also rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Dickerson. Claims 9 and 10 each depend from independent claim 1, which as described above is not taught or otherwise suggested by any of the cited references and is believed to be allowable. Accordingly, dependent claims 9 and 10 are also believed to be allowable.



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Claim 11 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Siegel, Gerhart, and Ours. Claim 11 depends from independent claim 1, which as previously described is believed to be allowable over the cited references. Ours fails to alter the analysis. Ours relates to a container for dispensing a solid and a liquid (Abstract). The two compartments of Ours are merely separated by a partition 16 or 60 formed within a single container or, in the embodiments formed by attaching two containers together, formed by mating the base of a first container 18 to the top surface of the frame 82 of the second compartment 12. As such, Ours also fails to teach or otherwise suggest a lip of the second compartment, through which the pour opening is formed, that abuts the rim of the first compartment as required by claim 1. Therefore, claim 1 is believed to be allowable over all the cited references. Accordingly, dependent claim 11 is also believed to be allowable.

Claim 21 was rejected under 35 U.S.C. §103(a) as being unpatentable over Bishop in view of Siegel and over Gerhart in view of Siegel. Claim 21 depends from claim 20, which as described above is not taught or otherwise suggested Bishop or Gerhart. Siegel fails to alter this analysis as Siegel is non-analogous art as also described above. Therefore, dependent claim 21 is also believed to be allowable over the cited references.

Claim 24 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Siegel. As described above, Gerhart fails to teach or otherwise suggest the limitations of claim 24. Also as described above, Siegel is non-analogous art and, therefore, is not an available reference for an obviousness rejection. Consequently, claim 24 is believed to be allowable over the cited references.

Claim 25 was rejected under 35 U.S.C. §103(a) as being unpatentable over Dickerson in view of Siegel and Gerhart. Claim 25 relates to a method of manufacturing a portable, single-use container separately containing two consumable products. The method includes providing a first, outer compartment including an annular rim and providing a second, inner compartment including an annular lip, the lip forming a pour opening. The method further includes placing the second compartment into the first compartment such that the lip rests on top of the rim. For

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similar reasons as described above, none of the cited references teach or otherwise suggest such limitations.

In particular, as cited by the Examiner, Dickerson fails to teach or otherwise suggest that the lip rests on the rim (Paper no. 13, ¶55). Gerhart fails to alter this analysis, as the attaching lip 215 that interacts with upper lip 105 is not the eating surface 225 which forms the vent or opening 230. As such, Gerhart fails to teach or otherwise suggest a lip of the second container that both forms the pour opening and rests on the rim of the first container as required by the limitations of claim 25. Siegel fails to alter this analysis because, as described above, Siegel is non-analogous art and not available for use in an obviousness rejection. Therefore, for at least the above described reasons, claim 25 is believed to be allowable over the cited references.

Claim 26 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Newarski and over Dickerson in view of Gerhart, Siegel, and Newarski. Claim 26 depends from claim 25, which as described above is not taught or otherwise suggested by the cited references. Newarski fails to alter this analysis, as Newarski relates to a container in which the dry and liquid foods are contained in a side by side manner. Therefore, Newarski also fails to teach or suggest a lip of the second container forming a pour opening and resting on top of the rim of the first container as required by independent claim 25. Therefore, none of the cited reference teach or otherwise suggest the limitations of claim 25. Accordingly, dependent claim 26 is also believed to be allowable.

Claims 27 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Newarski and Siegel and over Dickerson in view of Gerhart, Siegel, and Newarski. Claim 27 depends from independent claim 25. As described above, none of the cited references teach or otherwise suggest the limitations of independent claim 25, and claim 25 is believed to be allowable. Similarly, claim 27 is also believed to be allowable.

Finally, claim 32 was rejected under 35 U.S.C. §103(a) as being unpatentable over Gerhart in view of Siegel. Claim 32 depends from claim 25. As previously described above, none of the cited references teach or otherwise suggest the limitations of claim 25, which is believed to be allowable. Accordingly, dependent claim 32 is also believed to be allowable.

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**CONCLUSION**

In light of the above, Applicant believes independent claims 1, 15, 20, 22, 24, and 25 and the claims depending therefrom, are in condition for allowance. Allowance of these claims is respectfully requested.

No fees are required under 37 C.F.R. 1.16(b)(c). However, if such fees are required, the Patent Office is hereby authorized to charge Deposit Account No. 500471.

The Examiner is invited to contact the Applicants' Representative at the below-listed telephone number if there are any questions regarding this response.

Respectfully submitted,

John P. Rebhorn et al.,

By their attorneys,

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**CERTIFICATE UNDER 37 C.F.R. 1.8:**

The undersigned hereby certifies that this paper or papers, as described herein, are being deposited in the United States Postal Service, as first class mail, in an envelope address to: **Mail Stop Non-Fee Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450** on this 10<sup>th</sup> day of July, 2003.

By

Name: Timothy A. Czaja